

LAND ETHIC UNDER ATTACK: KEYSTONE XL AND THE WAR OVER DOMESTIC S(OIL)

Heather A. Culp*

ABSTRACT

The Keystone XL pipeline has caused recent controversy and renewed the debate over the future of fossil fuels in the United States. The project pits largely conservative groups, who argue that the pipeline will create jobs and decrease America's dependence on foreign oil, against environmental advocates, indigenous tribes, and private landowners, who are attempting to fend off the project because they believe it will displace them of their own lands as well as disrupt the natural ecosystems that lay in the pipeline's path. In the wake of a presidential veto of the project and renewed sentiment by the pipeline's manufacturer to move forward with the project by an alternative route, public outcry as to the safety of the pipeline and the environmental consequences of continued exploitation of the Canadian tar sands has increased.

This article analyzes the Keystone XL pipeline project through the lens of Earth Jurisprudence: a growing movement in the United States focused on changing the way humans view the environment when confronted with political and legal decisions that have direct and often adverse affects on the Earth. The teachings of Aldo Leopold and Thomas Berry encourage humans to re-imagine the legal system in a manner that broadens its focus to include current and future generations of humans, plants, animals, and ecosystems as equal parts of the whole rather than a chain of command where humans reign supreme. This article discusses several concepts and principles that are based upon or derived from the earth jurisprudence movement and applies these

* Heather Culp received a Juris Doctorate from Barry University School of Law with an Honors Certificate in Environmental and Earth Law in May 2013 and a Bachelor of Arts degree in English Literature from the Florida State University in 2010. The author would like to thank her friends and family for their unwavering love and support, and owes special thanks to Sister Patricia Siemen and Charles Prior for their valuable comments and suggestions throughout the writing process.

concepts to recent events surrounding the Keystone XL project. Ultimately, the author seeks to show readers that the Keystone XL pipeline is a temporary fix to America's problems and the risks associated with the project will cause irreparable political, economic, and environmental harm that will be felt for generations to come.

INTRODUCTION

Like the transcontinental railroad¹ in the nineteenth century, the TransCanada XL Keystone pipeline is barreling its way across the modern United States in a never-ending quest to transport more oil on home soil.² Keystone XL is the saving grace for many, who believe it will provide an increase in jobs and stronger national security to a country that is still in its post-recession rebuilding stage.³ Yet, the pipeline has its critics and one of those still not sold on the idea happens to be the leader of the free world.⁴ For some, TransCanada's project is a good boost for an economically derailed United States.⁵ For others, the Keystone XL pipeline will deplete resources, usurp the rights of

¹. *Transcontinental Railroad*, HISTORY.COM, available at <http://www.history.com/topics/transcontinental-railroad> (last visited Sept. 30, 2012) (documenting a railway designed to link the east and west coasts of the United States, making travel more convenient and less costly).

². Steven Mufson, *Keystone XL pipeline expansion drive by oil rich tar sands in Alberta*, THE WASHINGTON POST, June 30, 2012, available at http://www.washingtonpost.com/business/economy/keystone-xl-pipeline-expansion-driven-by-oil-rich-tar-sands-in-alberta/2012/06/30/gJQAVe4ZEW_story.html (arguing that Canadian tar sands produce enough oil to meet 20 percent of U.S. oil consumption allowing the U.S. to rely less heavily upon foreign oil).

³. *Id.*; see also Paul Wiseman, *U.S. Economic Recovery is Weakest Since World War II*, THE HUFFINGTON POST, August 15, 2012, http://www.huffingtonpost.com/2012/08/15/us-economic-recovery-weak_n_1783065.html.

⁴. Aamer Madhani and Susan Davis, *Obama rejects Keystone pipeline from Canada to Texas*, USA TODAY, Jan. 18, 2012, available at <http://www.usatoday.com/news/washington/story/2012-01-18/obama-rejects-keystone-pipeline/52655762/1>.

⁵. *Boehner: Keystone XL pipeline good for country and economy*, BBC, Jan. 18, 2012, <http://www.bbc.co.uk/news/world-us-canada-16624775>; see also Steven Mufson, *Keystone XL pipeline would add link in U.S.-Canada trade relations*, THE WASHINGTON POST, July 6, 2012, available at http://www.washingtonpost.com/business/keystone-xl-pipeline-creates-sticking-point-in-us-canada-trade-relations/2012/07/06/gJQAxcrRW_story.html.

property owners, and desecrate natural landscapes in an effort to harvest and ship oil to companies outside of the United States.⁶

With much debate surrounding the project the same question remains: will it solve America's problems? Many Americans have approached this issue economically, while a handful of individuals continue to argue that the Keystone XL pipeline could be devastating for both human health and the environment.⁷ The latter viewpoint aims at protecting critical habitat in areas such as the Nebraska Sandhills, a diverse region of ecosystems that provides home to many native plants and grasses, as well as numerous species of migratory birds, and large and small mammals.⁸ At the forefront of the battle, however, stands humankind. The debate has shifted its focus to private landowners, who are fighting the taking of their lands in the courts and through other grass-roots efforts.⁹

⁶. See Courtney Cherry, *The Keystone Pipeline: Environmentally Just?*, 6 ENVTL & ENERGY L. & POL'Y J. 125, 126 (2011) (discussing a November 2010 NRDC study, which listed several concerns relating to the project including threats to migratory birds, clean drinking water, and homeland security, as well as an increase in emissions of carbon dioxide); Christy Hoppe, *Oil Pipeline Plan Contested in Texas*, ORLANDO SENTINEL, Aug. 19, 2012, at A27; Anthony Swift, *Keystone XL is a tar sands pipeline to export oil out of the United States*, NAT. RESOURCES DEF. COUNCIL STAFF BLOG (Dec. 20, 2011), http://switchboard.nrdc.org/blogs/aswift/keystone_xl_is_a_tar_sands_pip.html ("Many of these [Gulf Coast] refineries are in Foreign Trade Zones where oil may be exported to international buyers without paying U.S. taxes.").

⁷. *Boehner: Keystone XL pipeline good for country and economy*, *supra* note 6; Cherry, *supra* note 7; cf. Josh Lederman, *Pressure mounting on Obama over pipeline decision*, ASSOCIATED PRESS, Dec. 1, 2012, available at <http://news.yahoo.com/pressure-mounting-obama-over-pipeline-decision-085407641—finance.html> (arguing that the issues of jobs and environmental concerns are surface problems when compared to the issues of climate change and American energy consumption).

⁸. See generally The Nebraska Sandhills, <http://thenebraskasandhills.com/Home.html> (last visited Nov. 3, 2012) (stating that the landscape of the Nebraska Sandhills region sustains over 720 species of plants, 300 species of birds, herds of bison, cattle, and deer, as well as several rodent species); see also Cherry, *supra* note 7.

⁹. Lisa Song, *Keystone XL: Neb. Landowners Sue Governor, but Case May Not Get Heard*, INSIDE CLIMATE NEWS, Sept. 26, 2012, available at <http://insideclimatenews.org/news/20120926/nebraska-keystone-xl-lawsuit-landowners-eminent-domain-heineman>; Hoppe, *supra* note 7; 3 *Blockaders Locked to Equipment*

A new approach to law and policy has emerged as a major talking point on the tongues of environmentalists in the Americas, India, and Africa in recent years.¹⁰ Earth Jurisprudence is a holistic approach to our legal system that calls upon the works and moral teachings of thinkers such as Aldo Leopold¹¹ and Thomas Berry.¹² Earth Jurisprudence incorporates and builds upon concepts in environmental law, but carefully divorces itself from the viewpoint that “man,” as owner, may establish his dominance over the land through the law.¹³ Unlike the field of environmental law, earth jurisprudence rejects an economic approach to law and governance and attempts to reimagine rather than embrace a system that is beyond repair.¹⁴ The movement recognizes that the environmental framework currently in place is constructed upon a faulty legal system which itself was founded upon

Stop Work at Keystone XL Site, ECOWATCH, Sept. 5, 2012, <http://ecowatch.org/2012/blockaders-stop-work-at-keystone-xl/> [hereinafter *Blockaders*].

¹⁰. CORMAC CULLINAN, *WILD LAW: A MANIFESTO FOR EARTH JUSTICE* 181-89 (2002) [hereinafter CULLINAN, *WILD LAW*].

¹¹. Leopold recognized that the boundaries of the human community could be enlarged “to include soils, waters, plants, and animals, or collectively: the land.” ALDO LEOPOLD, *A SAND COUNTY ALMANAC* 204, 211(1949). Leopold’s “Land Ethic” called for a sharing of the land among all members of the Earth Community, with each member possessing an individual biotic right to exist. *See id.*

¹². Berry argued for a new jurisprudence that casts away the shackles of a capitalistic industrial economy and embraces the larger Earth Community from a subjective rather than objective human viewpoint. *See* CORMAC CULLINAN, *A History of Wild Law*, in *EXPLORING WILD LAW: THE PHILOSOPHY OF EARTH JURISPRUDENCE* 14 (Peter Burdon ed., 2012); *see also* THOMAS BERRY, *EVENING THOUGHTS* 147 (2006) [hereinafter BERRY, *EVENING THOUGHTS*].

¹³. *See* LEOPOLD, *supra* note 12, at 204 (arguing for a land ethic that altered the role of humans from conqueror to a contributing member of the Earth Community).

¹⁴. Judith E. Koons, *At the Tipping Point: Defining an Earth Jurisprudence for Social and Ecological Justice*, 58 *LOY. L. REV.* 349, 351 (2012) [hereinafter Koons, *At the Tipping Point*] (“Tinkering with our present legal systems will not change the direction of the world as it advances toward the collapse of countries and the planet’s major ecosystems...Earth Jurisprudence is a developing field that rethinks law and governance from an Earth-centered perspective.”).

the idea that Nature's purpose is to serve humans.¹⁵ While environmental laws attempt to control anthropocentric behavior in order to preserve the Earth for the health and future of humans, Earth Jurisprudence seeks to develop a system that embraces the whole, while taking into account the inherent rights of its underlying parts to exist and thrive.¹⁶

This article will apply several concepts and principles emerging in Earth Jurisprudence to recent U.S. judicial and executive policy decisions in the states as well as on the federal level to determine whether the Keystone XL pipeline project falls in line with the protections of our current legal system, and whether the laws governing this area would better preserve the health and safety of the people and their environment if the principles of Earth Jurisprudence were taken into account. The first section of this paper will provide an extensive overview of Earth Jurisprudence and its main components. The article will next discuss the Keystone XL pipeline itself. Included in this discussion will be an analysis of recent policy decisions surrounding the project. Lastly, the discussion will end with an application of the principles of Earth Jurisprudence to illustrate how the Keystone XL pipeline does not conform with a much-needed Earth-centered approach to law and governance in the United States.

I. BACKGROUND

A. EARLY EARTH JURISPRUDENCE AND LEOPOLD'S "LAND ETHIC"

Without realizing it, early conservationist thinkers were speaking of the land in a way that created the building blocks for the present-day Earth Jurisprudence movement. In the late-1940s, Aldo Leopold, a

¹⁵. BERRY, EVENING THOUGHTS, *supra* note 13, at 147 (arguing that human power is derived from a postwar industrialist society that attempts to assert control over nature and the planet as a whole); *see also* JUDITH KOONS, *Key Principles to Transform Law for the Health of the Planet*, in EXPLORING WILD LAW: THE PHILOSOPHY OF EARTH JURISPRUDENCE 48, 50-51 (Peter Burdon ed., 2012) [hereinafter KOONS, *Key Principles*] (arguing that western philosophy and thought is centered around a subjective versus objective dualism that recognizes humans as the subject, while treating all non-human entities as the "other").

¹⁶. *See* World People's Conference on Climate Change and the Rights of Mother Earth, Universal Declaration of the Rights of Mother Earth, art. 2, § 1(a), Apr. 22, 2010, available at <http://therightsofnature.org/universal-declaration/>.

wildlife ecologist, published *A Sand County Almanac*,¹⁷ which contained a chapter on a concept that Leopold affectionately labeled the “Land Ethic.”¹⁸ This land ethic called for a sharing of the land among all members of the Earth Community, with each member possessing an individual biotic right to exist.¹⁹ Leopold’s distaste for the U.S. conservation system, which is based upon an economic framework, is evidenced by his belief that natural ecosystems should continue to flourish with little regard to the monetary advantages those resources provide to humans.²⁰

Leopold was ahead of his time. By the 1940s, Americans had turned to industrialism to promote the war effort.²¹ The country was entrenched in a second world war from 1941 to 1945.²² Women flocked to factories to support the war effort at home as their husbands fought in the battlefields.²³ When the war ended, thousands of troops returned home and many young men sought out work.²⁴ Industry was on the rise

¹⁷. See generally LEOPOLD, *supra* note 12.

¹⁸. *Id.* at 201; RODERICK FRAZIER NASH, *Island Civilization: A Vision for Human Occupancy of Earth and the Fourth Millennium*, in EXPLORING WILD LAW: THE PHILOSOPHY OF EARTH JURISPRUDENCE 342 (Peter Burdon ed., 2012).

¹⁹. LEOPOLD, *supra* note 12, at 204, 211.

²⁰. *Id.* at 211.

²¹. *Economy in World War II: Home Front*, SHMOOP.COM, available at <http://www.shmoop.com/wwii-home-front/economy.html> (last visited Oct. 7, 2012).

²². See *World War II*, HISTORY.COM, available at <http://www.history.com/topics/world-war-ii/page2> (last visited Oct. 7, 2012).

²³. *American Women in World War II*, HISTORY.COM, available at <http://www.history.com/topics/american-women-in-world-war-ii> (last visited Oct. 7, 2012) (stating that women made up thirty-seven percent of the workforce in the United States between 1940 and 1945).

²⁴. See *Economy in Postwar Suburbia*, SHMOOP.COM, available at <http://www.shmoop.com/postwar-suburbia/economy.html> (last visited Oct. 7, 2012) (“After World War II, the American economic landscape changed dramatically. Manufacturing and employment demands created by war mobilization transformed the Depression into an economic boom.”).

again as the nation recouped its losses.²⁵ In the 1950s, much of the country was being built up with more highways, more factories, and more homes.²⁶ When Leopold was writing about his connections with the natural world, his fellow Americans were concerned with how to transform the landscape to be more user friendly.²⁷ For Leopold, humans were citizens of the land-community.²⁸ The land was not a thing to be bought and sold based upon the economic value created by the human conqueror.²⁹ Leopold's land ethic can be thought of as an early Earth Jurisprudence.³⁰

Thomas Berry later described America's industrial economy as "extractive" and "nonrenewing."³¹ Rather than protecting the land, the U.S. legal system has allowed industrial and economic motives to tame and destroy what once was wilderness.³² To Berry, the American way of life led to overproduction and overconsumption without giving much thought as to the consequences of present action on a future world.³³

²⁵. See HOWARD ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES: 1492 - PRESENT* 425 (2003) (stating that the economic distress and unemployment of the 1930s was overcome by the war, which brought prosperity for workers and "rejuvenated American capitalism.").

²⁶. *The 1950s*, HISTORY.COM, available at <http://www.history.com/topics/1950s> (last visited Oct. 7, 2012); see also *The Interstate Highway System*, HISTORY.COM, available at <http://www.history.com/topics/interstate-highway-system> (last visited Oct. 7, 2012) (revealing that developments in the automobile industry allowed more Americans an opportunity to purchase affordable and dependable cars. As suburban development increased, driving became a necessity rather than a luxury).

²⁷. See *id.* (stating that Americans were moving further away from the city, thus requiring a means of travel that would still keep them connected).

²⁸. LEOPOLD, *supra* note 12, at 204.

²⁹. *Id.* at 204, 210-11.

³⁰. See CULLINAN, *A History of WildLaw*, *supra* note 13, at 19 (recognizing that "many American thinkers had already planted the seeds of a non-anthropocentric approach to law and governance," and then proceeds to discuss Leopold's land ethic).

³¹. BERRY, *EVENING THOUGHTS*, *supra* note 13, at 107.

³². *Id.*

³³. *Id.* at 109.

Disappointed with the way in which the legal system promoted industrial degradation of the land, Berry began to address a new type of jurisprudence; a jurisprudence rooted in “man’s” renewed covenant with the natural world.³⁴ Berry’s musings gave way to new thoughts and ideas that spread quickly and quietly.³⁵

Building upon the foundation laid by Berry, environmentalists began to envision the Earth Jurisprudence movement as “an approach to human governance” aiming to increase the “intimate connections between people and nature and to deepen our connection with the wild aspect of our own natures.”³⁶ Through the environmental ethic teachings of Earth Jurisprudence new generations are reminded that all of Earth’s creatures are participants in an interdependent network of constantly moving parts.³⁷ Humans are beginning to recognize that in order to obtain a higher understanding of themselves they cannot continue to assert their dominance over the land in an effort to control every aspect of Nature for their own benefit.³⁸

B. RE-IMAGINING AN ENVIRONMENTAL LAW FRAMEWORK.

Today, the concept of Earth Jurisprudence has developed into a way of thinking and acting that Leopold’s America would not have embraced.³⁹ A wave of environmental fervor in the 1970s gave birth to

³⁴. PETER BURDON, *Preface to EXPLORING WILD LAW: THE PHILOSOPHY OF EARTH JURISPRUDENCE*, at ix (Peter Burdon ed., 2012); *see also* BERRY, *EVENING THOUGHTS*, *supra* note 13, at 107.

³⁵. *See* CULLINAN, *WILD LAW*, *supra* note 11, at 179.

³⁶. *Id.* at 30.

³⁷. LEOPOLD, *supra* note 12, at 203.

³⁸. Lawrence H. Tribe, *Ways Not to Think about Plastic Trees: New Foundations for Environmental Law*, 83THE YALE L.J. 7, 1345 (1974) (in arguing that humans have entered into a master-slave relationship with those it considers to be lower beings, Tribe states: “[N]ew possibilities for respect and new grounds for community elevate both master and slave simultaneously, reaffirming the truth that the oppressor is among the first to be liberated when he lifts the yoke.”).

³⁹. *See Economy in Postwar Suburbia*, *supra* note 25.

new laws and initiatives that focused on environmental concerns.⁴⁰ While strong support for environmental conservation in the form of laws and regulations has certainly helped preserve the planet, the legislative reaction to environmental degradation is largely anthropocentric.⁴¹ The structure of current U.S. law and governance is restrictive in nature rather than preventative.⁴² Modern thinkers behind the Earth Jurisprudence movement harness a mentality moving forward that seeks to re-imagine the system from the ground up.⁴³ Earth Jurisprudence recognizes the inherent right of Nature to exist; a right not bestowed upon Earth by humankind.⁴⁴ Earth Jurisprudence rejects the facets of environmental law that continue to promote human dominance over the land.⁴⁵ However, the movement recognizes that without the use of tools implemented in the environmental law sphere, an Earth Jurisprudence perspective cannot develop.⁴⁶ Some of these tools are discussed further below.

⁴⁰. See *The Story of Silent Spring: How a courageous woman took on the chemical industry and raised important questions about humankind's impact on nature*, NRDC.ORG, available at <http://www.nrdc.org/health/pesticides/hcarson.asp> (last visited Nov. 17, 2012) (revealing that Carson was initially criticized by industry for her exposure of DDT as a harmful pollutant, but she is known today as the woman who launched an environmental revolution); see generally National Environmental Policy Act, 42 U.S.C. § 4321 (1970); Endangered Species Act, 42 U.S.C. §1531 (1973); Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 (1976); see also *Origins of EPA*, EPA.GOV, <http://www.epa.gov/aboutepa/history/origins.html> (last visited Oct. 7, 2012) (providing an overview of the birth of the Environmental Protection Agency in 1970).

⁴¹. Koons, *At the Tipping Point*, *supra* note 15, at 363-64.

⁴². See *id.* at 376-77 (arguing that quantitative risk assessment is based upon acceptable levels of harms rather than prevention or alternatives to those harms).

⁴³. KOONS, *Key Principles*, *supra* note 16, at 45.

⁴⁴. World People's Conference on Climate Change and the Rights of Mother Earth, *supra* note 17, at art. 2, § 1(a).

⁴⁵. See IAN MASON, *One in All: Principles and Characteristics of Earth Jurisprudence*, in *EXPLORING WILD LAW: THE PHILOSOPHY OF EARTH JURISPRUDENCE* 42-43 (Peter Burdon ed., 2012).

⁴⁶. See NICOLE GRAHAM, *Owning the Earth*, in *EXPLORING WILD LAW: THE PHILOSOPHY OF EARTH JURISPRUDENCE* 260 (Peter Burdon ed. 2012) ("The human ownership and use of various parcels of the Earth and its resources are directly related.

i. Earth Jurisprudence and the Public Trust Doctrine

In its traditional form, the public trust doctrine was asserted to protect public rights to fish, navigate, and engage in commerce in waters of the United States.⁴⁷ These protections were later extended to protect wildlife, preserve natural resources, and grant public access to coastal waters.⁴⁸ As the environmental movement came into full force in the 1970s, use of the public trust doctrine “as a legal tool to fight broad-scale environmental degradation” became a backdrop to large-scale regulation.⁴⁹ The use of the public trust doctrine in other countries, such as Canada, has slowly emerged in the courts as a mechanism for enforcing the protection of public access to natural resources, but is not as widely recognized as it is in the United States.⁵⁰ The public trust doctrine defies the traditional underpinnings of property law because it is not based upon the individual rights of private property owners.⁵¹ Rather, the public trust doctrine promotes the management of common resources for the public welfare as a whole, and the preservation of these resources for use by future generations.⁵²

Recent scholarship has promoted the rise of the Nature’s Trust paradigm, an Earth-centered approach to the public trust doctrine.⁵³

Our jurisprudence or system of laws should therefore reflect this direct relationship through the alignment of the law that governs use and ownership – the alignment of property law and environmental law.”).

⁴⁷. Mary Turnipseed et al., *Reinvigorating the Public Trust Doctrine: Expert Opinion on the Potential of a Public Trust Mandate in U.S. and International Environmental Law*, ENVIRONMENT, Sept. 2010, at 7.

⁴⁸. *Id.*

⁴⁹. *Id.*

⁵⁰. Elizabeth Hendriks, *Common Law: Implementing the public trust doctrine in British Columbia*, WATERCANADA, Nov./Dec. 2010, at 26.

⁵¹. *See* Turnipseed, *supra* note 48, at 7.

⁵². *Id.*

⁵³. Mary Christina Wood, *Nature’s Trust: Reclaiming an Environmental Disclosure*, 25 VA. ENVTL. L.J. 243, 260 (2007); *see also* Maude Barlow, *Our Commons Future is Already Here*, ONTHECOMMONS.ORG, available at

Proponents of this ideology recognize that Americans are frustrated with the current structure of U.S. environmental law.⁵⁴ These scholars argue that environmental laws, which were originally designed to protect human health and the environment, no longer have that effect.⁵⁵ Rather than a system of laws designed to halt environmental degradation and its impact on humans, environmental laws grant agencies authority and discretion that is easily influenced by powerful interest groups and political factions.⁵⁶ U.S. administrative agencies have become a false front for major corporations and other wealthy developers seeking to manipulate the land purely for human gain.⁵⁷ All one has to do is seek permission and permission is easily granted.⁵⁸ Thus, many argue that the system has already failed.⁵⁹

The Nature's Trust paradigm advocates for the protection of Earth's natural resources by the very people that, in some instances, have sought to destroy it.⁶⁰ As beneficiaries of the trust, humans must encourage the trustees⁶¹ to manage the corpus, or property of the trust, in

<http://onthecommons.org/our-commons-future-already-here> (last visited Nov. 14, 2012) (stating that "[a] central characteristic of the Commons is the need for careful collaborative management of shared resources by those [humans] who use them and allocation of access based on a set of priorities.").

⁵⁴. *Id.* at 268 ("The public is overwhelmed and dizzied by the complexity of modern environmental law.").

⁵⁵. *Id.* at 254 ("The entire premise of administrative law is that agencies are neutral creatures and will use their discretion to serve the interests of the public.").

⁵⁶. *Id.*

⁵⁷. *Id.* (addressing the overwhelming reality that environmental laws have become a mechanism for the EPA to determine how much toxic dumping is just right for humans).

⁵⁸. *Id.* at 252-53.

⁵⁹. See generally Mary Christina Wood, *Nature's Trust: Reclaiming an Environmental Disclosure*, 25 VA. ENVTL. L.J. 243, 252-56 (2007).

⁶⁰. *Id.* at 274 (briefly highlighting the story of the Joseph Creek Salmon, where community members brought their local regulators out to the site of a proposed development, so that they could stand "face to face" with the very lives their decision could destroy).

⁶¹. In this case, the government. *Id.* at 261-62.

a manner that preserves it for current and future generations of the Earth.⁶² This doctrine recognizes that the survival of the human race is dependent upon the preservation and vitality of the land.⁶³ The Nature's Trust paradigm appears as a model seeped in concepts of the new jurisprudence called upon by the late Thomas Berry.⁶⁴ Earth Jurisprudence is grounded in the urgency of the need for humans to rise up and assert themselves as members of the Earth Community.⁶⁵ As conscious, thinking entities, humans have the ability to make observations and decisions that they act upon.⁶⁶ In the context of the Nature's Trust, humans are a community of Bioneers.⁶⁷ As Bioneers, humans must find innovative ways to show their local officers, state agencies, friends, family members, and neighbors that the interests of nature are in line with the interests of current and future human and Earth generations.⁶⁸

ii. Traditional Property Rights: Owning the Land

Society's dependence on a market-based economy stands in direct contrast with the teachings of Earth Jurisprudence.⁶⁹ The Western

⁶². *Id.* [Mary Christina Wood, *Nature's Trust: Reclaiming an Environmental Disclosure*, 25 VA. ENVTL. L.J. 243, 261-62 (2007)].

⁶³. *Id.* at 261.

⁶⁴. CULLINAN, *A History of Wild Law*, *supra* note 13, at 14; *see also* BERRY, *EVENING THOUGHTS* *supra* note 13, at 147.

⁶⁵. KOONS, *Key Principles*, *supra* note 16, at 51.

⁶⁶. *See* THOMAS BERRY and BRIAN SWIMME, *THE UNIVERSE STORY: FROM THE PRIMORDIAL FLARING FORTH TO THE ECOZOIC ERA* 11 (1992); *see also* LIZ HOSKEN, *Reflections On an Intercultural Journey Into Earth Jurisprudence*, in *EXPLORING WILD LAW: THE PHILOSOPHY OF EARTH JURISPRUDENCE* 25-26 (Peter Burdon ed., 2012).

⁶⁷. Wood, *supra* note 54, at 243 (defining that term as "an intentioned, innovative, diverse group of people who share a commitment to the future of this planet.").

⁶⁸. *See id.* at 270 ("Bioneers should get to know these trustees personally, befriend them, and have respectful conversations with them, face to face.").

⁶⁹. *See* Koons, *At the Tipping Point*, *supra* note 15, at 367-68.

system of governance and law is structured around an anthropocentric framework, which assumes that, “all resources are available for human use and all values are cognizable in monetary form.”⁷⁰ This market of exploitation of the Earth’s natural ecosystems is realized through concepts embedded in property ownership.⁷¹ Traditional property law promotes human interests and power through ownership of the land.⁷² The harms that occur upon another man’s land are viewed as an attack not upon the Earth, but upon the human.⁷³ When a landowner brings a nuisance claim against his neighbor, the court examines the offending action as it relates to interference with one landowner’s legal use of his property.⁷⁴ The value placed upon the land and its resources is prescribed by humans based upon its worth to the owner for the uses that he has envisioned.⁷⁵ However, for some resources, no value can be ascribed.⁷⁶ This market confusion leads to an abusive system that freely allocates resources based upon dominant human interests.⁷⁷ As a result, the Earth’s natural resources are depleted at accelerated levels due to the absence of effective regulations on use.⁷⁸

Furthermore, the current U.S. system of environmental laws is built upon a framework that dictates acceptable levels of pollution upon the

⁷⁰. *Id.* at 363-64; Patrick Tolan, *Ecocentric Perspectives on Global Warming: Toward an Earth Jurisprudence*, 1 THE GLOBAL STUD. J. 39, 42 (2008).

⁷¹. *See* Tolan, *supra* note 71, at 43.

⁷². *E.g.*, GRAHAM, *supra* note 47, at 272.

⁷³. ERIC FREYFOGLE, *BOUNDED PEOPLE, BOUNDLESS LANDS* 137 (1998); Joseph R. Sax, *Ownership, Property, and Sustainability*, 31 UTAH ENVTL. L. REV. 1, 3 (2011).

⁷⁴. FREYFOGLE, *supra* note 74, at 140.

⁷⁵. Sax, *supra* note 74, at 2.

⁷⁶. Tolan, *supra* note 71, at 44 (discussing the polar bear, which is a protected species and thus receives no use value on the open market given that it cannot be killed for its fur or meat).

⁷⁷. *Id.* at 45.

⁷⁸. *See* Wood, *supra* note 54, at 252-255; *see also* FREYFOGLE, *supra* note 74, at 140.

land, which reflect the bottom-line limits on human use and control.⁷⁹ A permit system for controlling pollution, which was originally designed with good intentions, has been overpowered by political interests.⁸⁰ The environmental agencies on both the federal and state levels have become gluttons for abuse by big business.⁸¹ Rather than risk angering the rich and the powerful, agency officials remain silent, rubber-stamping projects that promote further degradation of the land.⁸² In reality, a system that was created as a means to protect nature has become a mechanism for destroying it all in the name of economic progress.⁸³ The lesson here is that everyone has a price, while nature does not.⁸⁴

This mindset has led many to argue that Nature's bounty has fallen victim to a tragedy of commons.⁸⁵ Natural resources, such as the air and water, remain free for use by all without any recourse for the exploitation that often occurs at the hands of a few.⁸⁶ Some scholars embrace human ownership of the land, arguing that privatization of natural resources is needed to adequately preserve them for future generations.⁸⁷ This argument views private landowners as stewards of the land.⁸⁸ Thus, actions taken by landowners upon private soil can

⁷⁹. Wood, *supra* note 54, at 255.

⁸⁰. *Id.* at 252, 257.

⁸¹. *Id.* at 257.

⁸². *Id.* at 254-55.

⁸³. *Id.* at 252.

⁸⁴. Tolan, *supra* note 71, at 45 ("The polar bear simply does not care about the money.").

⁸⁵. See Megan Mcardle, *Property Rights and the Tragedy of the Commons*, THE ATLANTIC, May 22, 2012, available at <http://www.theatlantic.com/business/archive/2012/05/property-rights-and-the-tragedy-of-the-commons/257549/>.

⁸⁶. *Id.*

⁸⁷. See FREYFOGLE, *supra* note 74, at 145.

⁸⁸. *Id.* at 144-45.

further environmental goals rather than run contrary to them.⁸⁹ Similarly, Earth Jurisprudence examines both human and non-human interests in the land.⁹⁰ By providing Nature with a voice of its own, Earth Jurisprudence allows this collective entity to come to the table as an equal just as corporations and other inanimate objects have done for decades.⁹¹ Thus, Earth is not merely a resource to be exploited by humans, but rather a living body afforded a right to co-exist with humans and have its interests equally considered and respected.⁹²

C. TRANSCANADA KEYSTONE XL

On May 4, 2012, TransCanada submitted its proposal to the U.S. Department of State to build a pipeline transporting crude oil from Hardisty, Alberta, to Steele City, Nebraska.⁹³ The Keystone XL pipeline project will subsequently join another pipeline currently under construction along the Gulf Coast that will enable producers in Texas to transport the oil to refineries along the Gulf of Mexico for distribution.⁹⁴ The project has received significant backlash from environmental

⁸⁹. *Id.* at 145 (“Communities as well as individuals can engage in discussions of excellent land use.”).

⁹⁰. *See* Tolan, *supra* note 71, at 45 (discussing “the Earth Community as a communion of subjects not a collection of objects.”).

⁹¹. *Sierra Club v. Morton*, 405 U.S. 727, 742-43 (1971) (Douglas, J., dissenting).

⁹². *See* Tolan, *supra* note 71, at 45 (“[W]e realize the indivisibility of the Earth—its soil, mountains, rivers, forests, climate, plants, and animals, and respect it collectively not only as a useful servant but as a living being.”).

⁹³. U.S. Department of State, *New Keystone XL pipeline Application*, USA.GOV, available at <http://www.keystonepipeline-xl.state.gov/> (last visited Oct. 21, 2012); *See* *Keystone XL pipeline Project*, TRANSCANADA.COM, <http://www.transcanada.com/keystone.html> (last visited Nov. 16, 2012).

⁹⁴. *Gulf Coast Pipeline Project*, TRANSCANADA.COM, available at <http://www.transcanada.com/gulf-coast-pipeline-project.html> (last visited Sept. 9, 2012) (reporting that the Gulf Coast pipeline is expected to extend from Cushing, Oklahoma to Nederland, Texas with construction beginning in August 2012); Lederman, *supra* note 8 (stating that the Gulf Coast pipeline did not require presidential approval, but President Obama has shown support for the project).

groups, indigenous tribes, and private landowners.⁹⁵ Despite the company's reassurance that it is dedicated to minimizing the environmental impacts of its proposed project, the company has "reclaimed thousands of acres of [ecologically sensitive] native rangeland on pipeline rights-of-way throughout North America."⁹⁶

i. Canadian Tar Sands

Aside from its effect on ecologically sensitive areas of land, the Keystone XL pipeline will transport synthetic crude oil from the Canadian tar sands into the United States.⁹⁷ Tar sands consist of heavy, black sticky oil that is comprised of clay, water, sand, and bitumen.⁹⁸ The tar sands are mined and the bitumen that is extracted is processed into oil.⁹⁹ Many environmentalists have raised concerns about the effect of tar sands on climate change.¹⁰⁰ The tar sands process involves dredging similar to strip mining.¹⁰¹ Where the sands are deeper in the soil, wells are drilled to allow the injection of steam that forces the bitumen to rise to the surface.¹⁰² This process requires large amounts of energy, which generates an exorbitant amount of greenhouse gases (GHGs).¹⁰³ In addition, indigenous tribes have denounced the tar sands

⁹⁵. See Hoppe, *supra* note 7; Blockaders, *supra* note 10.

⁹⁶. *Environmental Responsibility*, TRANSCANADA.COM, available at <http://www.transcanada.com/environmental-responsibility.html> (last visited Sept. 9, 2012).

⁹⁷. Mufson, *supra* note 3.

⁹⁸. 2012 Oil Shale & Tar Sands Programmatic EIS, *About Tar sands*, OSTSEIS.ANL.GOV, available at <http://ostseis.anl.gov/guide/tarsands/index.cfm> (last visited Nov. 16, 2012).

⁹⁹. *Id.*

¹⁰⁰. Mufson, *supra* note 3.

¹⁰¹. *Id.*

¹⁰². *Id.*

¹⁰³. *Id.*; see also Tom Zeller Jr., *TransCanada On the Climate Impacts of Its Keystone XL Pipeline*, HUFF POST BLOG (Jan. 17, 2013, 11:13 AM), available at

process and the pipeline project as unnecessary and harmful to their way of life.¹⁰⁴ In 2011, over four hundred tar sands protesters were arrested in Washington, D.C.¹⁰⁵ The protesters consisted of indigenous peoples from both the United States and Canada, who felt it was their duty to stand up for Mother Earth, as well as all current and future generations.¹⁰⁶ The protestors argued that the Keystone XL pipeline would not benefit Americans, but rather the highest paying customers at the expense of both humans and the environment.¹⁰⁷

ii. *A Shifting Battle and the Abuse of the Public Domain*

Following rejections of its proposal by President Barack Obama for failure to establish alternative routes, TransCanada announced that it would establish a new route in Nebraska that “will avoid the Sandhills, a region of prairie and sand dunes that is rich in plants and wildlife, with

http://www.huffingtonpost.com/tom-zeller-jr/transcanada-on-the-climat_b_2496838.html?ncid=edlinkusaolp00000003.

¹⁰⁴. Tar Sands Invasion: How Dirty and Expensive Oil from Canada Threatens America’s New Energy Economy, *available at* <http://www.nrdc.org/energy/files/TarSandsInvasion-full.pdf>, at 11 (last visited Nov. 16, 2012) [hereinafter Tar Sands Invasion] (stating that the Athabasca Chipewyan and Mikisew Cree tribes called for moratorium on tar sands development because they can no longer “hunt and fish in their traditional territories” due to tar sands pollution in downstream rivers and deforestation).

¹⁰⁵. Rob Capriccioso, *Indigenous Oil Sands Protest Leads to White House Arrests*, INDIAN COUNTRY TODAY MEDIA NETWORK, Sept. 2, 2011, *available at* <http://indiancountrytodaymedianetwork.com/2011/09/02/indigenous-oil-sands-protest-leads-to-white-house-arrests-51420> (reporting that the protesters were charged with civil disobedience for carrying their signs too close to the gates of the White House); *see also Tar Sands Pipeline Renews Energy vs. Environmental Debate*, Public Broadcasting Service (Aug. 29, 2011), *available at* http://www.pbs.org/newshour/bb/environment/july-dec11/oilpipeline_08-29.html. Recent protests in Washington, D.C. has resulted in additional arrests. John M. Broder, *Keystone XL Protesters Seized at White House*, NY TIMES, Feb. 13, 2013, *available at* <http://green.blogs.nytimes.com/2013/02/13/arma-virumque-cano-police-arrest-keystone-protesters/>.

¹⁰⁶. *Id.*

¹⁰⁷. *Id.*

thousands of ponds and lakes.”¹⁰⁸ It is unclear whether the project will go forward at this time, but the company has resubmitted its proposal to the U.S. Department of State.¹⁰⁹ In March 2013, The State Department released a draft Environmental Impact Statement outlining potential issues associated with the project, including potential impacts to the habitats of over thirteen threatened and endangered species already under or being considered for federal protection.¹¹⁰ During the most recent presidential debate, Republican candidate Mitt Romney argued in favor of the pipeline proposal, stating on numerous occasions that the President’s rejection of the pipeline was an attempt to undermine the efforts of Americans looking to stabilize the economy, increase national security, and boost the job market.¹¹¹

With an alternative route proposal on the table,¹¹² the fight against the pipeline has shifted its focus to private landowners, who argue that a

¹⁰⁸. Timothy Gardner, *TransCanada submits new Keystone XL route in Nebraska*, REUTERS, Sept. 5, 2012, available at <http://www.reuters.com/article/2012/09/05/us-pipeline-keystone-route-idUSBRE88412A20120905>; see also Madhani, *supra* note 5.

¹⁰⁹. John M. Broder, *Governor of Nebraska Backs Route for Pipeline*, NY TIMES, Jan. 22, 2013, available at http://www.nytimes.com/2013/01/23/science/earth/keystone-pipeline-route-approved-by-nebraska-governor.html?_r=0; *Keystone XL pipeline Project*, *supra* note 94; Lederman, *supra* note 8 (“The pipeline requires State Department approval because it crosses an international boundary.”).

¹¹⁰. U.S. Department of State, *Draft Supplementary Environmental Impact Statement (SEIS)*, USA.GOV, available at <http://keystonepipeline-xl.state.gov/draftseis/index.htm> (last visited March 1, 2013) (such species include the endangered whooping crane, which is expected to migrate over portions of pipeline in northern South Dakota, North Dakota, and Montana during the fall and spring migration periods); See also M. Alex Johnson, *State Department admits Keystone environmental impact but says there’s no better way*, March 1, 2013, available at http://usnews.nbcnews.com/_news/2013/03/01/17149564-state-department-admits-keystone-environmental-impact-but-says-theres-no-better-way?lite.

¹¹¹. *Full Transcript of the Second Presidential Debate*, NY TIMES, Oct. 16, 2012, available at http://www.nytimes.com/2012/10/16/us/politics/transcript-of-the-second-presidential-debate-in-hempstead-ny.html?pagewanted=all&_r=0; see Madhani, *supra* note 5.

¹¹². Josh Funk, *Keystone XL: Nebraska Route Revised By TransCanada*, HUFFINGTON POST, Sept. 5, 2012, available at http://www.huffingtonpost.com/2012/09/05/keystone-xl-nebraska-route_n_1857955.html (stating that the alternative proposal was submitted to the

private company has no right to take their lands under the guise of government authority.¹¹³ TransCanada continues to maintain that its relations with private landowners are founded upon honesty, fairness, and mutual respect; however, property owners view the project as an attempt to displace them from their homes and destroy their lands.¹¹⁴ Private landowners are taking their fight to the courts, and a recent Supreme Court decision in Texas may provide them with ground to stand on despite early shortcomings in the lower courts of Texas and other states set to host portions of the pipeline.¹¹⁵

Nebraska Department of Environmental Quality (DEQ), which was tasked with reviewing the plan and providing a recommendation to the State's governor. Once approved by the State, the plan is then resubmitted to the U.S. Department of State for presidential review); *see also* Broder, *Governor of Nebraska Backs Route for Pipeline*, *supra* note 110 (In January 2013, the alternative route was approved by Nebraska Governor Dave Heineman and now awaits review and approval by the Department of State and the President. Governor Heineman has reversed his initial opposition to the project, stating that the new route avoids sensitive areas within the state, and will bring jobs and "millions of dollars in new revenue to Nebraska.").

¹¹³. *See* Hoppe, *supra* note 7; *see also* Deena Winter, *Passions run high at Keystone oil pipeline hearing*, NEBRASKAWATCHDOG.org, Dec. 4, 2012, available at <http://watchdog.org/63233/passions-run-high-at-keystone-oil-pipeline-hearing/> (at a December 4, 2012, public hearing in Albion, Nebraska, over onehundred individuals voiced their opinions about the pipeline, with a majority of those testifying in opposition to the project. Those who spoke against the pipeline included landowners, Native American tribe representatives, and anti-pipeline activists).

¹¹⁴. *Landowner Relations/Public Involvement*, TRANSCANADA.COM, available at <http://www.transcanada.com/landowner-relations.html> (last visited Sept. 9, 2012); *see* Hoppe, *supra* note 7.

¹¹⁵. Hoppe, *supra* note 7; *compare* Shaina Zucker, *Texas judge rules in favor of Keystone pipeline progress*, HOUSTON BUSINESS JOURNAL, Aug. 24, 2012, available at http://www.bizjournals.com/houston/morning_call/2012/08/texas-judge-rules-in-favor-of-keystone.html (stating that a county court judge ruled against a Texas landowner, bringing suit under principles of eminent domain, in determining that the Keystone XL project qualifies for common carrier status), *with Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, 363 S.W.3d 192, 202 (Tex. 2012) (holding that a pipeline company "was not entitled to common-carrier status as required for exercise of the power of eminent domain simply because it obtained a common-carrier permit, filed a tariff, and agreed to make the pipeline available to any third party wishing to transport its gas in the pipeline...").

TransCanada argues that it qualifies as a “common carrier”¹¹⁶ to justify the taking of private land.¹¹⁷ Under the traditional approach, first fashioned by the U.S. Supreme Court in *Kelo v. City of New London, Connecticut*,¹¹⁸ the exercise of eminent domain by the government must constitute a taking for the public use and just compensation must be made to the owner.¹¹⁹ The Texas Supreme Court has held that the pipeline must serve a public purpose and cannot benefit the owner exclusively in order for common carrier status with the power of eminent domain to attach.¹²⁰ Thus, “merely making the pipeline available for public use is [not] sufficient to confer common-carrier status.”¹²¹ In order to determine whether the pipeline will serve the public, the company’s relations with third parties must be analyzed.¹²² At this juncture, it is too early to determine whether the pipeline company will violate the requirements of the common carrier exception as the “contracts with third-party oil companies to transport [the] crude” cannot occur until construction of the pipeline nears completion.¹²³

Recently, the Texas Supreme Court refused to rehear a pipeline case and, in doing so, stated that “having a company mark an ‘X’ in a box on a form wasn’t enough to entitle a company to take private

¹¹⁶. BLACK’S LAW DICTIONARY 88 (9th ed. 2009) (defining the term as “[a] commercial enterprise that holds itself out to the public as offering to transport freight or passengers for a fee.”).

¹¹⁷. *Blockaders*, *supra* note 10.

¹¹⁸. *Kelo*, 545 U.S. 469, 477 (2005).

¹¹⁹. *Id.*

¹²⁰. *Texas Rice Land Partners*, 363 S.W.3d at 200 (stating that pipeline transporting carbon dioxide to wholly owned subsidiary of the pipeline owner and applicant fails to satisfy the public-use requirement).

¹²¹. *Id.* at 201.

¹²². *See id.* at 200-02; *see also Hoppe*, *supra* note 7.

¹²³. *Hoppe*, *supra* note 7.

property.”¹²⁴ The current process in the State of Texas consists of the carrier company checking off a box on its application to the Texas Railroad Commission that identifies it as a common carrier.¹²⁵ No further proof or paperwork is required.¹²⁶ Judges in Texas have voiced their concerns with this process, stating that “[t]he right of private property is a fundamental right expressly protected in the constitution,” and a corporate entity “must do more than check a box on a government form” to be granted the authority prescribed by eminent domain.¹²⁷

The Texas Supreme Court’s decision is likely to be the first of a string of decisions in states affected by the Keystone XL pipeline as private landowners and public interest groups continue to challenge approval of the project.¹²⁸ In one instance, Texas landowner Julia Trigg Crawford challenged the taking of her land in court.¹²⁹ TransCanada argues that it has a valid easement across Crawford’s land.¹³⁰ Crawford argues, however, that the pipeline is unsafe and private landowners have a right to deny large corporations from building on their land.¹³¹ Landowners worry that the materials transported by the pipeline through their lands is volatile and unsafe.¹³² Crawford, like many landowners,

¹²⁴. Jennifer Hiller, *Pipeline case gives landowners leverage*, THE HOUSTON CHRONICLE, March 3, 2012, at 1; *see also Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, 2012 WL 3777071, at *1 (Tex. 2012).

¹²⁵. *Cautiously apply eminent domain*, AUSTIN AMERICAN-STATESMAN, March 27, 2012, at A10; Hiller, *supra* note 125.

¹²⁶. *See id.*

¹²⁷. *Texas Rice Land Partners, Ltd.*, 2012 WL 3777071, at *1.

¹²⁸. *See Hoppe, supra* note 7; *see also Song, supra* note 10.

¹²⁹. Hoppe, *supra* note 7.

¹³⁰. *Id.*

¹³¹. *Id.*

¹³². *See id.* (stating that TransCanada is arguing that it needs Crawford’s land to ship diluted bitumen, which will then be used to break down tar sands oil. In order to transport the mixture – which is similar in consistency to roof tar – “the pipeline must operate under heavy pressure.”).

feels that TransCanada has not been receptive to her concerns.¹³³ The company has effectively blocked out landowners in the negotiation process by having portions of their property condemned and purchasing easements on the condemned lands without the property owners' knowledge.¹³⁴ The only redress offered to landowners is in the form of an appeal of the price offered them for their land.¹³⁵ In August of 2012, a Texas county court judge ruled against Crawford, upholding the company's easement and stating that TransCanada does not have to prove in detail that the pipeline would be generally available to all oil shippers, not just a few private companies.¹³⁶ This ruling contradicts in part the earlier Texas Supreme Court ruling, holding that a challenge to the common carrier status of a corporation shifts the burden of proof onto the party claiming the exemption to show that "the pipeline will at some point after construction serve the public by transporting gas for one or more customers who will either retain ownership of their gas or sell it to parties other than the carrier."¹³⁷

iii. Moving Forward in the Fight Against Keystone XL

The road to defeating the Keystone XL pipeline will not be an easy one. Activists have been successful in stalling segments of the project and the pipeline was temporarily shut down in October of 2012 due to safety concerns; however, powerful interest groups that possess a strong

¹³³. See *id.*

¹³⁴. *Id.*; TEX. PROP. CODE ANN. § 21.012 (West 2011) (requiring that the entity first attempt make a "bono fide offer to acquire the property from the owner voluntarily." If no agreement for compensation is reached, the entity may then commence condemnation proceedings by filing a petition in court a providing a copy of the petition to the owner of the subject property); see also TEX. PROP. CODE ANN. § 21.001 (West 2011) (stating that county courts and district courts within the state of Texas "have concurrent jurisdiction in eminent domain cases.").

¹³⁵. Hoppe, *supra* note 7; TEX. PROP. CODE ANN. § 21.042 (West 2011).

¹³⁶. Zucker, *supra* note 116.

¹³⁷. *Texas Rice Land Partners, Ltd.*, 363 S.W.3d at 202.

hold on Congress continue to support the project.¹³⁸ TransCanada has already received regulatory approval from the National Energy Board (NEB) in Canada and is merely awaiting U.S. approval.¹³⁹ In January of 2012, President Obama rejected TransCanada's permit application, stating that there was insufficient information to ensure that the American people would be protected given that alternative pipeline routes had not been fully developed.¹⁴⁰ President Obama's rejection of the permit occurred as a result of its inclusion in legislation by House Republicans attempting to force a decision on the project.¹⁴¹ The legislation addressed an extension of the payroll tax cut, but also required the President to "either issue a permit...or explain why it was not in the national interest by Feb. 21."¹⁴² The President has expressed his belief that the pipeline project will move forward once certain safeguards are implemented.¹⁴³

¹³⁸. *Blockaders*, *supra* note 10; Heather Hollingsworth, *Keystone Pipeline: TransCanada Restarts 2,100-Mile Structure After Possible Safety Issues*, HUFFINGTON POST, Oct. 22, 2012, available at http://www.huffingtonpost.com/2012/10/22/keystone-pipeline-transcanada_n_2003851.html; see Madhani, *supra* note 5 (reporting that Republicans such as House Speaker John Boehner and Energy and Commerce Committee Chairman Fred Upton have questioned the Obama Administration's rejection of TransCanada's permit application).

¹³⁹. *Status and Timelines*, TRANSCANADA.COM, available at <http://www.transcanada.com/5738.html> (last visited Sept. 11, 2012).

¹⁴⁰. Madhani, *supra* note 5.

¹⁴¹. *Id.*

¹⁴². *Id.*; see also Temporary Payroll Tax Cut Continuation Act of 2011, H.R. 3765, 112th Cong. (2011).

¹⁴³. See Mary Bruce, *Obama Defends Oil Record, Fast-Tracks Portion of Keystone Pipeline*, ABC NEWS, March, 22, 2012, available at <http://abcnews.go.com/blogs/politics/2012/03/obama-defends-oil-record-fast-tracks-keystone-pipeline/> ("Obama continued to argue that his administration is receptive to domestic drilling, even if he has not given the go-ahead for the full Keystone XL pipeline."); see also John Ibbitson, *Obama set to okay pipeline, former insider says, as poll shows support*, THE GLOBE AND MAIL, April 22, 2013, available at <http://www.theglobeandmail.com/news/politics/obama-set-to-okay-pipeline-former-insider-says-as-poll-shows-support/article11446197/> (stating that proponents of the pipeline argue that the political pressures associated with passing the President's second-term agenda through Congress, which largely backs the project, coupled with

Construction for the Gulf Coast pipeline, which will connect the Keystone XL to oil refineries along the Gulf of Mexico, has already begun despite legal challenges.¹⁴⁴ The U.S. Environmental Protection Agency (EPA) has criticized the Keystone XL project for its numerous failures.¹⁴⁵ As a result, it is likely that the project will require significant alterations in order to gain approval from the Obama Administration, which vowed to invest in clean energy sources during his 2012 presidential re-election campaign.¹⁴⁶ Meanwhile, proponents of the pipeline project believe that the pipeline will create jobs and limit American dependence on foreign oil, while mitigating environmental harms.¹⁴⁷ In contrast, environmentalists continue to fight approval of the project, arguing that allowing the pipeline will have significant negative environmental implications and the benefits cited by

the short-term goals of struggling Americans will serve as the impetus for the President's inevitable approval of the Keystone XL).

¹⁴⁴. *Gulf Coast Pipeline Project*, supra note 95; Lowell M. Rothschild, *Court Upholds Key Use of Wetland Permit for Utility Lines, Denies Initial Challenged to Keystone Pipeline*, the National L. Rev., Aug. 8, 2012, available at <http://www.natlawreview.com/article/court-upholds-key-use-wetland-permit-utility-lines-denies-initial-challenges-to-keys> (reporting that the Sierra Club challenged the Corps issuance of a permit allowing minor impacts to wetlands among several water bodies likely to be crossed along the pipeline's route. The Corps' permit was ultimately upheld in Oklahoma Federal Court).

¹⁴⁵. Matthew Daly, *EPA: Keystone XL Oil Pipeline Environmental Analysis By State Department is Insufficient*, HUFFINGTON POST, June 7, 2011, available at http://www.huffingtonpost.com/2011/06/07/epa-keystone-xl-transcanada-state-department_n_872689.html; see also Cherry, supra note 7, at 129.

¹⁴⁶. Devin Dwyer, et al., *Former Obama Staffer Leads White House Protest Against Pipeline*, YAHOO! NEWS, April 24, 2013, available at <http://news.yahoo.com/blogs/power-players-abc-news/former-obama-staffer-leads-white-house-protests-against-111050839.html?vp=1> (stating that activists argue that approval of the pipeline will contradict election promises made by President Obama to put money into clean energy technology rather than oil. Approval of the pipeline would thus render the President's promises empty and meaningless to those who voted for him in hopes that he would take a stand in combating climate change and halting further environmental degradation in the U.S.).

¹⁴⁷. Mufson, supra note 3.

proponents are misleading.¹⁴⁸ Although the company argues that both the Keystone XL pipeline and the Gulf Coast pipeline will move “large amounts of oil into the marketplace,” landowners are hesitant to allow a foreign company onto their lands to make a profit on American soil.¹⁴⁹ Furthermore, stories of similar pipelines experiencing numerous spills and accidents during the first years of operation have only caused greater apprehension in the minds of many Americans.¹⁵⁰

II. APPROACHING KEYSTONE XL FROM AN EARTH JURISPRUDENCE PERSPECTIVE

While the United States appears gridlocked on the issues of environmental preservation and economic progress, many international communities have begun to promote a unified front against environmental degradation by enacting both local and global measures to prevent further ecological decline.¹⁵¹ At the center of this movement is the recognition that Mother Nature has a right to exist and thrive.¹⁵²

¹⁴⁸. See Capriccioso, *supra* note 106; see also Tar Sands Invasion, *supra* note 105, at 14 (stating that over ninety-nine percent of Canadian Crude is exported to the United States today, but this only makes up about four percent of total U.S. oil consumption. Thus, America will likely still have to rely on foreign markets to quench its thirst for oil).

¹⁴⁹. Hoppe, *supra* note 7.

¹⁵⁰. *Id.*; cf. *West Virginia Pipeline Explosion: Safety Hearing Scheduled After Sissonville's Gas Line Rupture*, HUFF POST GREEN BLOG (Jan. 7, 2013, 1:03 PM), available at http://www.huffingtonpost.com/2013/01/07/west-virginia-pipeline-explosion-2012-sissonville_n_2425831.html?ncid=edlinkusaolp00000003 (revealing that a gas pipeline explosion that destroyed a portion of Interstate 77 and several homes in Virginia recently prompted a safety hearing before the U.S. Senate Committee in late January); Dan Forsch, *Pipeline Spills Stir New Criticism of Keystone Plan*, N.Y. TIMES, April 2, 2013, available at http://www.nytimes.com/2013/04/03/us/pipeline-spills-stir-new-criticism-of-keystone-proposal.html?_r=0 (reporting that on April 29, 2013, an Exxon Mobile pipeline carrying crude oil from the Canadian tar sands ruptured in a residential neighborhood, causing the evacuation of twenty-two homes and endangering countless wildlife. The spill has reignited conversations surrounding the safety of similar oil pipelines such as the Keystone XL).

¹⁵¹. See World People's Conference on Climate Change and the Rights of Mother Earth, *supra* note 17.

¹⁵². See *id.*

Across the world, initiatives encouraging the consideration and incorporation of the individual rights of Nature are making a mark in social and political arenas.¹⁵³ International courts have recently begun to recognize the inherent rights and individual liberties of natural resources, such as the Whanganui River in New Zealand.¹⁵⁴

In 2008, the Ecuadorean people voted to include provisions in the country's constitution granting Nature the "right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution."¹⁵⁵ In some instances, individuals are taking the fight to protect Nature to the courts and early successes have encouraged change moving forward.¹⁵⁶ The movement to protect the vital ecosystems of the planet is grounded in Earth-centered principles that can alter and shape U.S. law and policy moving forward.¹⁵⁷ These efforts to protect Earth for the enjoyment of present and future generations recognize Earth as a living, breathing being, whose survival shapes and supports the success of all generations.¹⁵⁸

¹⁵³. See *id.*

¹⁵⁴. Robin Milam, *Whangui River Given Rights as a Legal Entity*, GLOBAL ALLIANCE FOR THE RIGHTS OF NATURE, Sept. 17, 2012, <http://www.globalexchange.org/news/whangui-river-given-rights-legal-entity> (describing a preliminary agreement forged between the Whanganui River iwi and the Crown government of New Zealand, which "recognizes the river and all its tributaries as a single entity, Te Awa Tupua, and makes it a legal entity with rights and interests, and the owner of its own river bed.").

¹⁵⁵. Andrew C. Revkin, *Ecuador Constitution Grants Rights to Nature*, NY TIMES BLOG (Sept. 29, 2008, 8:34 AM), <http://dotearth.blogs.nytimes.com/2008/09/29/ecuador-constitution-grants-nature-rights/>; see also CONSTITUTION OF THE REPUBLIC OF ECUADOR Oct. 20, 2008, ch. 7, art. 71-74.

¹⁵⁶. Wood, *supra* note 54, at 263-265 (discussing the Supreme Court of the Philippines, which in 1993, awarded a judgment in favor of future generations of children, whose guardians alleged that continued logging of ancient rainforests would devastate the land at an accelerated rate, thus denying future generations the benefit of these natural resources).

¹⁵⁷. Koons, *At the Tipping Point*, *supra* note 15, at 366 ("To effect this structural shift, ecosystems should be at the heart of law and governance.").

¹⁵⁸. See BERRY, EVENING THOUGHTS, *supra* note 13, at 150.

A. RE-EXAMINING KEYSTONE XL FROM THE GROUND UP

The first step is to come to the realization that American laws are shaped and constructed with only human wants and needs in mind.¹⁵⁹ When one approaches the Keystone XL pipeline from the perspective of the environment, it becomes clear that the project will degrade the land and pose a potential threat to all species wherever it ultimately comes to rest.¹⁶⁰ Despite nationwide protests by environmentalists, a denial of approval from President Obama until full environmental consideration has occurred, and a re-routing by TransCanada to avoid ecologically sensitive lands, the Keystone XL project allows the interests of humans to reign supreme in battles and controversies that befall the land.¹⁶¹ Although environmental groups have battled the project on grounds of environmental degradation, alterations made to the project have missed the mark.¹⁶²

TransCanada's alternative route around the Nebraska Sandhills is arguably a step in the right direction from the human perspective; however, the degradation that will likely occur in Canada and along the newly proposed route in North America counts as several steps back when all interests are taken into account.¹⁶³ TransCanada continues to pump and extract oil from the Canadian tar sands, where the mining of bitumen releases large amounts of carbon dioxide and other emissions

¹⁵⁹. Koons, *At the Tipping Point*, *supra* note 15, at 363; *see also* CULLINAN, WILD LAW, *supra* note 11, at 67 ("Our legal and political establishments perpetuate, protect and legitimize the continued degradation of Earth by design, not by accident.").

¹⁶⁰. Cherry, *supra* note 7, at 126.

¹⁶¹. Lederman, *supra* note 8 (stating that the most recent march on the White House occurred in November 2012); *Blockaders*, *supra* note 10; Madhani, *supra* note 5; Gardner, *supra* note 109.

¹⁶². Cherry, *supra* note 7, at 127 (stating that in 2010, the No Tar Sands Oil Coalition, supported by environmental groups such as the Corporate Ethics Club, Sierra Club, Greenpeace, Friends of the Earth, and several other prominent organizations, launched a campaign urging the President to put a stop to the project); *see also* Gardner, *supra* note 109.

¹⁶³. *See* Hoppe, *supra* note 7 (stating that spills have plagued similar oil pipelines across America); *see also* Cherry, *supra* note 7, at 129.

into the air that ultimately contribute to global warming.¹⁶⁴ In the region surrounding these tar sands deposits, an additional increase in annual emissions for greenhouse gases and other harmful pollutants is expected.¹⁶⁵ The associated land uses at these sites include large-scale clearings of trees, topsoil, sand, clay, and gravel that rest above the tar sands.¹⁶⁶ Although these projects are conditioned upon a reclamation plan, the Canadian government has stated that it could take up to fifteen years before any success is known.¹⁶⁷

In addition to land and air, the tar sands are taking a large toll on water sources.¹⁶⁸ The water used for the mining of bitumen is often

¹⁶⁴. See Friends of the Earth, *Keystone XL pipeline: The Basics*, FOE.ORG, available at <http://www.foe.org/projects/climate-and-energy/tar-sands/keystone-xl-pipeline> (last visited Nov. 5, 2012) (oil companies that have invested in the Canadian tar sands hope to utilize the Keystone XL pipeline to expand operations); Alberta's Oil Sands, *Air*, ALBERTA GOVERNMENT, <http://www.oilsands.alberta.ca/air.html> (last visited Nov. 5, 2012).

¹⁶⁵. *Air Pollution*, OILSANDSWATCH.ORG, <http://www.pembina.org/oil-sands/os101/air-pollution> (last visited Nov. 5, 2012) (revealing that annual emissions projections for nitrogen oxides indicates an increase from 37,000 tonnes in 2006 to 190,000 tonnes in 2015, while sulphur dioxide emissions is expected to increase by approximately 44,000 tonnes over the same period); see also Zeller Jr., *supra* note 104 (revealing that the pipeline project's impact on the climate is significantly greater than previously determined due to the exclusion of petroleum coke emissions, a refinery byproduct, from past analysis on climate impact resulting from the project).

¹⁶⁶. Oil Sands FAQs, *Does oil sands 'mining' affect the environment?* ALBERTA GOVERNMENT, available at http://www.energy.alberta.ca/OilSands/792.asp#Does_oil_sands_mining_affect_the_environment (last visited Nov. 5, 2012).

¹⁶⁷. Alberta's Oil Sands, *Reclamation*, ALBERTA GOVERNMENT, available at <http://www.oilsands.alberta.ca/reclamation.html> (last visited Nov. 5, 2012) (documenting the first reclamation certificate issued in 2008).

¹⁶⁸. Keith Schneider and Sam Kean, *Tar sands Oil Production, An Industrial Bonanza, Poses Major Water Use Challenges*, CIRCLEOFBLUE.ORG, Aug. 10, 2010, available at <http://www.circleofblue.org/waternews/2010/world/tar-sands-oil-production-is-an-industrial-bonanza-poses-major-water-use-challenges/> (stating that tar sands oil producers have been granted a license by the Alberta Government to withdraw approximately 172 billion gallons of water from rivers annually for the mining and processing of bitumen).

pumped from nearby rivers, which reduces flow considerably.¹⁶⁹ The large amounts of energy used in conjunction with the water that is required to extract bitumen and convert it to synthetic crude also makes the mining process more dangerous to both humans and the environment.¹⁷⁰ The effect that the tar sands have on aquatic life has also been a large point of controversy surrounding the project. In 2007, a study revealed a high rate of deformity in the embryos of fish that were exposed to the tar sands.¹⁷¹ Furthermore, in 2010, data released by the Canadian government revealed an increase in dumping of known carcinogens in mining lakes, known as tailing ponds, near active tar sands mines.¹⁷² A recent study, financed by the Canadian government and released in January 2013, has confirmed that the development of the tar sands is causing an increase in the levels of cancer-causing agents found in lakes surrounding Alberta's oil sands.¹⁷³ Some of these lakes

¹⁶⁹. See *id.* (revealing that only ten percent of the river water is returned to its source and the remainder is poured into tailing ponds, which are considered toxic).

¹⁷⁰. Friends of the Earth, *Keystone XL pipeline: An Environmental Crime in Process*, FOE.ORG, available at <http://www.foe.org/projects/climate-and-energy/tar-sands/keystone-xl-pipeline> (last visited Nov. 5, 2012); see also Global Warming & Energy, *Background: Environmental Impacts of Tar sands Development*, SIERRACLUB.ORG, <http://www.sierraclub.org/energy/factsheets/tarsands.asp> (last visited Nov. 5, 2012).

¹⁷¹. Sean A. McNeill, et al., *Immunological impacts of oil sands-affected waters on rainbow trout evaluated using in situ exposure*, 84 ECOTOXICOLOGY & ENVTL SAFETY 254, 260 (2012).

¹⁷². Stacy Feldman, *Carcinogen Levels in Oil Sands Waste Water Increasing, Canada Admits*, INSIDE CLIMATE NEWS, Aug. 17, 2010, available at <http://insideclimatenews.org/news/20100817/carcinogen-levels-oil-sands-waste-water-increasing-canada-admits> (stating that five of the most active oil sands mines were determined to have released approximately 50,000 tons of pollutants in tailings ponds between 2006 and 2009). One particularly disturbing example of the level of toxicity of these waste ponds includes the death of at least 1,600 ducks that landed in these waters and subsequently drowned. Tar Sands Invasion, *supra* note 105, at 14.

¹⁷³. Ian Austin, *Oil Sands Industry in Canada Tied to Higher Carcinogen Level*, THE NEW YORK TIMES, Jan. 7, 2013, available at http://www.nytimes.com/2013/01/13/world/americas/oil-sand-industry-in-canada-tied-to-higher-carcinogen-level.html?_r=1& (scientists analyzed over fifty years of sediment data from six lakes north of the Fort McMurray, Alberta, which is known as the central location of the oil sands industry. Testing samples revealed an increase in levels for known carcinogens, such as polycyclic aromatic hydrocarbons (PAHs), since the large-

were located as far as fifty miles north of the center for oil sands production in Alberta.¹⁷⁴ Furthermore, the pipeline itself will cause its own environmental hazards, including the potential for spills where the pipeline is weak or flawed.¹⁷⁵

Applying an Earth Jurisprudence lens to the Canadian tar sands and the Keystone XL pipeline reveals that humans have failed to account for the basic needs of the Earth. Under an Earth Jurisprudence perspective, the river is recognized as having a right to flow; the fish a right to swim in that river; the trees a right to take root in the ground where they stand and not be cleared by humans so that the oil lying dormant underneath may be ripped from the ground and sold on the open market.¹⁷⁶ The Keystone XL project fails to recognize this right and feeds off an economic system of environmental abuse and destruction.¹⁷⁷ The location of the pipeline matters little. No matter where the pipeline is ultimately laid to rest, the digging up of the Earth will likely have a disastrous effect on the plants and animals that once made the land their home.¹⁷⁸ Diverse ecosystems such as those in the path of the Keystone XL pipeline are essential to the survival of the planet as a whole,

scale production of oil sands began in 1978. Scientists caution that these levels will continue to rise).

¹⁷⁴. *Id.*

¹⁷⁵. Johnson, *supra* note 111 (reporting that on March 1, 2013, the U.S. Department of State acknowledged that “the construction phase of the project would result in carbon dioxide emissions equivalent to about 626,000 passenger vehicles operating for a full year,” while the potential for spills and leaks remains a substantial hazard following completion of the pipeline); *see also* U.S. Department of State, *Draft Supplementary Environmental Impact Statement (SEIS)*, *supra* note 111.

¹⁷⁶. *See* Linda Sheehan, *Clean Water Act 2.0: Rights of Waterways*, HUFFINGTON POST, Oct. 15, 2012, *available at* http://www.huffingtonpost.com/linda-sheehan/clean-water-act-20-rights_b_1967028.html (“Only by recognizing the inherent rights of the natural world to exist, thrive and evolve may we begin to rectify this imbalance and ensure the well-being of both people and planet.”).

¹⁷⁷. *See* Daly, *supra* note 146; *see also* BERRY, *EVENING THOUGHTS*, *supra* note 13, at 108 (discussing the shortfalls of an economic system driven solely by industry).

¹⁷⁸. *See* Capriccioso, *supra* note 106.

including humans.¹⁷⁹ As evidenced by the harsh outcry over the routing of the pipeline through the Nebraska Sandhills region, the pipeline's presence in North America will likely have devastating effects on whole ecosystems regardless of where it is located.¹⁸⁰ Thus, a rerouting of the pipeline fails to serve as a solution when the ultimate outcome is human-only gain accompanied by severe environmental losses.¹⁸¹

B. INCORPORATING THE PERSPECTIVES OF PRESENT AND FUTURE GENERATIONS

i. Keystone XL Fails to Satisfy Present Human Needs

Earth-based law does not shun the human perspective, but rather incorporates it as an equal part of the equation with consideration of the Earth and its natural resources, as well as future generations.¹⁸² However, when one looks at the Keystone XL pipeline project from the human perspective, the likelihood that the pipeline will cause more harm than good is high. The teachings of Earth Jurisprudence reveal that human interests must be confronted and accounted for in order to successfully accommodate planetary interests.¹⁸³ Failure to do so perpetuates a system that excludes components that will have an effect upon one another.¹⁸⁴

The effect that the pipeline is expected to have on private landowners has become a major talking point as TransCanada continues

¹⁷⁹. See Linda Sheehan, Submission by Earth Law Center to the U.N. Conference on Sustainable Development, *available at* <http://www.uncsd2012.org/rio20/index.php?page=view&type=510&nr=413&menu=20>.

¹⁸⁰. Funk, *supra* note 113 (reporting that the newest proposed route still crosses sensitive lands including the Ogallala Aquifer, thus renewing the same concerns associated with the previous route).

¹⁸¹. *Id.*

¹⁸². See Sheehan, *supra* note 180.

¹⁸³. *Id.*

¹⁸⁴. LEOPOLD, *supra* note 12, at 203.

to seek approval for the project.¹⁸⁵ However, private landowners are not the only group likely to face setbacks as a result of the project. The pipeline is also expected to take its toll on environmental justice communities.¹⁸⁶ As private landowners seek redress in the courts against the project, other communities with less economic resources will continue to suffer.¹⁸⁷ Despite the belief that most landowners seek only to dominate the land by asserting their ownership over it, some argue that the system moving forward must utilize the unique perspective that they bring to the table.¹⁸⁸ Those owners that seek to preserve the land have the option to use the land in a manner that is both responsible and beneficial for the Earth and for themselves.¹⁸⁹ This can serve as a model promoting an Earth-based system in a society that is strongly rooted in ownership and dominance.¹⁹⁰ One may own the land, but with that ownership exists a duty to preserve it for one's own future use as well as the use of future human and non-human generations.¹⁹¹

Despite the ease associated with an anthropocentric viewpoint of the preservation of nature through responsible land ownership, the battle against Keystone XL will ultimately be lost if one approaches the project from the human perspective alone. Those supporting the pipeline argue that the benefits to humans in the form of job creation

¹⁸⁵. See Hoppe, *supra* note 7; Blockaders, *supra* note 10; Keystone XL pipeline Project, *supra* note 94.

¹⁸⁶. Capriccioso, *supra* note 106; see also Lynne Peeples, *Keystone XL Risks Harm to Houston Community: 'This Is Obviously Environmental Racism'*, HUFF POST GREEN, March 27, 2013, available at http://www.huffingtonpost.com/2013/03/27/keystone-xl-pipeline-houston-air-pollution_n_2964853.html?ncid=edlinkusaolp00000003.

¹⁸⁷. *Id.*; E.g., Song, *supra* note 10.

¹⁸⁸. FREYFOGLE, *supra* note 74, at 144-45 (recognizing that there are many landowners who dedicate themselves to promoting "fertile, healthy land" with the consideration of future generations in mind. The author sees these landowners as viewing themselves as stewards over the land rather than dominators).

¹⁸⁹. *Id.*

¹⁹⁰. *Id.* at 136 (arguing for a form of property law that includes natural resources law and pays closer attention to the land rather than the interests of humans).

¹⁹¹. See *id.*

and increased national security outweigh the costs.¹⁹² This perspective is rooted in a defunct economic system that ultimately fails those who stand in the way of what some label as progress.¹⁹³ Furthermore, these arguments are invalid.¹⁹⁴ The increase in jobs is merely a temporary fix to an on-going problem.¹⁹⁵ The jobs created will be temporary construction jobs that will disappear once the pipeline has reached full construction.¹⁹⁶ The more realistic likelihood is that the Keystone XL pipeline will be utilized to transport crude to refineries along the Gulf of Mexico that are owned by foreign entities.¹⁹⁷ Those companies will likely ship the harvested oil overseas ultimately forcing the United States to remain dependent upon oil from foreign markets, an outcome many arguing in favor of the pipeline said would be avoided.¹⁹⁸

ii. The Impact of the Keystone XL pipeline on Future Generations

In addition to the recognition of present generations of humans, animals, and natural ecosystems, Earth Jurisprudence considers the interests of future generations.¹⁹⁹ When the project is analyzed from the perspective of future generations, one realizes that the Keystone XL

¹⁹². Madhani, *supra* note 5.

¹⁹³. See BERRY, EVENING THOUGHTS, *supra* note 13, at 107-08.

¹⁹⁴. Capriccioso, *supra* note 106.

¹⁹⁵. Madhani, *supra* note 5 (stating that approximately 4,650 temporary construction jobs will be created and will last for a period of two years); see also CORNELL UNIVERSITY GLOBAL LABOR INSTITUTE, PIPE DREAMS? JOBS GAINED, JOBS LOST BY THE CONSTRUCTION OF THE KEYSTONE XL, 7-8, 27-32 (2011) (“The project will create no more than 2,500-4,650 temporary direct [non-local] construction jobs for two years, according to TransCanada’s own data supplied to the State Department.” The study finds further that more jobs will be lost than gained as a result of higher fuel prices, as well as increased damage to local economies caused by oil spills and pollution).

¹⁹⁶. *Id.*

¹⁹⁷. Capriccioso, *supra* note 106.

¹⁹⁸. *Id.*

¹⁹⁹. *Id.*; Madhani, *supra* note 5.

pipeline has the potential to destroy whole ecosystems well before future generations will walk upon the Earth.²⁰⁰ Around the world, and in the United States, court cases are being brought on behalf of the world's children and future generations to fight environmental degradation.²⁰¹ These cases have been largely successful in declaring lands to be held in trust for future generations.²⁰² This argument can easily be extended to future plant and animal generations. Earth jurisprudence has the potential to take the public trust doctrine one step further by recognizing that all public land should be held in common not only for future human generations, but for future Earth generations – including all living and breathing plants, animals, and humans – as well.²⁰³ The potential of the Keystone XL pipeline to cause long-term environmental degradation in North America will prevent future generations from fully enjoying the planet, and in some instances, will prevent their very existence and way of life.²⁰⁴

CONCLUSION

The teachings of Earth Jurisprudence ultimately reveal that the Keystone XL pipeline project is not in the best interests of all Earth generations, which have not been adequately considered by those that support the project.²⁰⁵ The high likelihood of future environmental

²⁰⁰. See Capriccioso, *supra* note 106.

²⁰¹. Wood, *supra* note 54, at 264-64. Just this year, a judge in Texas utilizing the public trust doctrine declared that the air belongs to the public in the form of a trust when several groups brought suit “[o]n behalf of the youth of America” against the State of Texas for neglecting its duty to reduce greenhouse gas emissions in its capacity “as a common law trustee of the ‘public trust’ responsible for the air and atmosphere.” David Morris, *Texas Judge Rules The Sky Belongs To Everyone*, ON THE COMMONS, July 25, 2012, available at <http://www.onthecommons.org/magazine/texas-judge-rules-sky-belongs-everyone>.

²⁰². *Id.*

²⁰³. FREYFOGLE, *supra* note 74, at 147.

²⁰⁴. Capriccioso, *supra* note 106.

²⁰⁵. *Id.*

degradation coupled with the already existing ecological destruction occurring in Canadian air, soil, and water has the potential to decrease the quality of life for all those who share this Earth.²⁰⁶ Furthermore, re-routing the project to avoid ecologically sensitive lands significantly fails to offset the environmental harm that will occur when the pipeline is fully constructed.²⁰⁷ Current human generations must acknowledge that the pipeline is primarily driven by an economic system set upon destroying Earth's natural resources in the spirit of short-term monetary gain.²⁰⁸

In order to solve the issues presented by Keystone XL, and many similar environmental projects before it, advocacy for structural change in the underlying system of law and governance is required.²⁰⁹ Humanity can no longer approach the environmental and economic crises solely from an anthropocentric perspective.²¹⁰ The legal system must be re-structured so as to take into account the interests of all beings and allow the enactment of laws that incorporate the collective rights of humans, animals, and natural ecosystems into a new legal framework.²¹¹ Approaching Keystone XL with only human wants and needs in mind reveals the failures of TransCanada's endeavor.²¹² Approaching this same project with an ecocentric perspective leads to an even greater realization of the irreversible harm that is likely to result from large-scale degradation enacted upon the land and all living creatures.²¹³ The

²⁰⁶. E.g., Cherry, *supra* note 7, at 128-30. As well as contribute to issues such as climate change and increased GHG emissions. *Air Pollution*, *supra* note 164; Mufson, *supra* note 3.

²⁰⁷. Funk, *supra* note 113.

²⁰⁸. See Capriccioso, *supra* note 106; Madhani, *supra* note 5.

²⁰⁹. Koons, *At the Tipping Point*, *supra* note 15, at 351.

²¹⁰. *Id.* at 364, 389.

²¹¹. Tolan, *supra* note 71, at 48; KOONS, *Key Principles*, *supra* note 16, at 54-55.

²¹². Madhani, *supra* note 5; see also Capriccioso, *supra* note 106.

²¹³. Capriccioso, *supra* note 106; see also Cherry, *supra* note 7.

Keystone XL pipeline is not the answer to America's economic woes.²¹⁴ If humans fail to act now, Earth Jurisprudence demonstrates that the current industrial-economic system, which supports projects like Keystone XL with a "business-as-usual" mentality, will destroy those resources that ensure the survival of future generations.²¹⁵

²¹⁴. *Contra Boehner: Keystone XL pipeline good for country and economy*, *supra* note 6.

²¹⁵. *See* BERRY, EVENING THOUGHTS, *supra* note 13, at 107; Koons, *At the Tipping Point*, *supra* note 15, at 351.